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No. 95-371

In the

Supreme Court of the United States

October Term, 1995

DOUGLAS COUNTY, OREGON,
Petitioner,

v.

BRUCE BABBITT, Secretary of the Interior, HEADWATERS, INC., and UMPQUA VALLEY AUDUBON SOCIETY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DOUGLAS COUNTY, OREGON

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of petitioner, Douglas County, Oregon. Written consent to the filing of this brief has been granted by

counsel for all parties and copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 25,000 members and contributors and has litigated many public interest cases, a number of which have involved the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321, *et seq.*) and the Endangered Species Act (ESA) (16 U.S.C. § 1531, *et seq.*). *See, e.g., Pacific Legal Foundation v. Andrus*, 657 F.2d 629 (6th Cir. 1981).

PLF has participated in numerous cases before the United States Supreme Court including *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where its attorneys were counsel of record and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); and *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994); where PLF participated as amicus curiae.

Amicus seeks to augment the arguments in the Petition for Writ of Certiorari. PLF believes that its public policy perspective and litigation experience in support of balanced environmental regulation will provide a valuable additional viewpoint with respect to the legal issues presented.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, 48 F.3d 1495 (9th Cir. 1995), is found in petitioner's appendix (App.) at 1a-28a. The opinion of the United States District Court for the District of Oregon, 810 F. Supp. 1470 (D. Or 1992), is found in petitioner's appendix at 29a-58a.

STATEMENT OF THE CASE

The issue in this case is whether the United States Fish and Wildlife Service (FWS) was required to comply with NEPA when it designated 6.9 million acres "critical habitat" for the Northern Spotted Owl, a protected species under ESA. *See* App. at 31a-32a. This is an important question that has the potential to affect hundreds if not thousands of communities, and hundreds of thousands of citizens. The question now stands before this Court in need of final and conclusive resolution.

In determining what areas to include within critical habitat, the Secretary of Interior is to take "into consideration ... **any** ... **relevant impact** of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). This relevant impact analysis is quite important because the Secretary of Interior can then exclude any area from the critical habitat if, based on the analysis, he determines the benefits of exclusion outweigh the benefits of inclusion. *Id.* The only time exclusion is prohibited is if exclusion would result in extinction of the species concerned. *Id.*

The designation of habitat as critical can have significant relevant impacts on future federal and private activities. Under Section 7 of ESA, 16 U.S.C. § 1536(a)(2), every federal agency shall insure that any action authorized, funded, or carried out by that agency does not destroy or adversely modify critical habitat. Thus, designation of land as critical habitat can have a profound impact on whether the land is able to be productively used. Jon A. Souder, *Chasing Armadillos Down Yellow Lines: Economics in the Endangered Species Act*, 33 NAT. RESOURCES J. 1095, 1122 (1993) (Souder). Additionally, land designated as critical habitat may require "special management," 16 U.S.C. § 1532(5)(A)(i), which in turn may seriously conflict with

not only the productivity of adjacent nondesignated lands but also their environmental well being.

These relevant impacts were the essence of Douglas County's demand that NEPA be complied with. It wanted FWS to take into consideration how federal land management of critical habitat adjacent to county-owned land could cause serious environmental damage through insect, disease, and fire impacts. App. at 129. Douglas County wished to insure that all potential consequences of and alternatives to the proposed habitat designation were well understood and carefully considered prior to designation because, as the District Court ruled, "defendants' designation of critical habitat will profoundly affect the quality of life in Douglas County." App. at 39a.

Had the Secretary complied with NEPA, he would have taken into consideration these relevant impacts and would have evaluated alternative designations that could have avoided significant impacts. Unfortunately, the Secretary took the position that he is exempt from NEPA when designating critical habitat. This decision precipitated the instant suit. App. at 33a.

In response, the District Court ruled there was no basis on which FWS was excused from NEPA compliance prior to finalizing its designation of Northern Spotted Owl critical habitat. The District Court found that because the process and basis for designating critical habitat does not establish a "clear and unavoidable conflict" with NEPA, and because NEPA is to be followed "to the fullest extent possible," NEPA applies. App. at 41a; 56a. Without taking exception to these findings, the Ninth Circuit Court of Appeals nevertheless reversed. App. at 25a.

SUMMARY OF ARGUMENT

Whether FWS must comply with NEPA when designating critical habitat for a species protected under ESA is an important question having national significance. The productive use of private lands in every state will be affected by critical habitat designations. Moreover, habitat designation can have a variety of environmental and other relevant impacts that will not be considered unless FWS follows NEPA. Accordingly, designation decisions must comply with NEPA so that not only biological factors associated with a listed species, but all relevant impacts of a designation are considered.

Additionally, the Ninth Circuit's decision not to require NEPA compliance conflicts with other circuits which follow this Court's *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-88 (1976), precedent. Furthermore, neither the language of ESA nor its legislative history discloses an intent for ESA to displace NEPA during the process of designating critical habitat. Actually, the Ninth Circuit has substituted its judgment for Congress' by establishing what factors are to be considered in designating critical habitat. Thus, review of the Ninth Circuit's decision is needed not only because the underlying issue has such important national significance but also to reestablish Congress' constitutional authority to determine when a statute is to apply.

REASONS FOR GRANTING THE WRIT

I

THE ISSUE OF COMPLIANCE WITH NEPA PRIOR TO CRITICAL HABITAT DESIGNATION PRESENTS AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE

The ESA is one of the strongest, most uncompromising environmental statutes ever passed by Congress. Glears and

Wellmany, *Economics and the Endangered Species Act*, 13 PUB. L. REV. 149 (1992). It prohibits, except under very limited circumstances, the "taking" of a species listed under the Act as either endangered or threatened. 16 U.S.C. § 1538(a)(1)(B). The term "take" has a very broad meaning. Literally, the statute states that the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). This conduct is prohibited except under very limited circumstances and is subject to civil and criminal enforcement for violation. *See* 16 U.S.C. § 1540(a) and (b).

The Act also precludes certain actions in areas designated as critical habitat of listed species. 16 U.S.C. § 1536(a)(2). The term "critical habitat" includes those specific areas actually occupied by the species and on "which are found those physical and biological features which are essential to the conservation of the species and which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A). Specific areas outside the occupied lands may also be designated if the Secretary determines those areas are essential to the conservation of the species. *Id.* However, the Secretary has a great deal of flexibility over what lands are designated as he is to take into consideration not only biological factors but also the economic impact and ***any other relevant impact*** of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2).

Once an area has been designated as critical habitat for a listed species, there are significant limitations on the use of that land. For example, no activity on federal land and no activity on private land which requires a federal agency authorization or funding may take place if it is likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction, or adverse modification, of that species' critical habitat. 16 U.S.C.

§ 1536(a)(2).[1] Thus, designation of one's land as critical habitat can result in significant impediments to use of the property. It is vital from the landowner's viewpoint for the Secretary of Interior, who has ultimate designation authority, to be fully informed on all aspects of potential critical habitat designations prior to making a final decision. This question of full and adequate information is the underlying issue in this case. What information is required under the law to be produced for the Secretary prior to his designation and determination?

Recently the United States General Accounting Office produced a report entitled *Endangered Species Act Information on Species Protection on Nonfederal Lands* (GAO/RCED-95-16, Dec. 1994). This report acknowledged that, as of May 10, 1993, over 90% (712 out of 781) of the listed species in the United States for which the Fish and Wildlife Service had responsibility, had some or all of their habitat on nonfederal lands. Of the 712 species, over 60% of their total habitat is on nonfederal lands while 264 of the 712 species are completely dependent on nonfederal lands for their habitat. Moreover, private landowners (private citizens and companies or corporations) are the most prevalent type of owners of nonfederal habitat; 619 species have some or all of their habitat on these lands. Governmental entities (state, county, and/or city governments) are the owners of habitat for 516 listed species. Other owners of lands containing habitat for listed species include utilities, water districts, port districts, airports, and universities.

Nonfederal landowners have a major stake in the designation of land as critical habitat for listed species. At the

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[1] This section allows a normally prohibited action to proceed if an exemption is obtained from the Endangered Species Committee. 16 U.S.C. § 1536(o). The exemption is seldom given.

time of the GAO report, 80 of the 105 species for which critical habitat had already been designated had a portion of that critical habitat on nonfederal lands. More than half of those, or 43 species, had over 80% of their critical habitat on nonfederal lands. GAO report at 6; *see* 50 C.F.R. § 17.95 (listing of current critical habitat designations). With over 675 critical habitat designations yet to be made and over 6.9 million acres designated just for one species, the Northern Spotted Owl, it can be readily seen that there are many acres of private land that will be affected by future designations and that is only the beginning. As of the fall of 1994, 895 species had been listed and there were nearly 4,000 proposed or candidate species. NWI Resource, Vol. 5, Issue 1, Fall 1994, *Endangered Species Blueprint* at 20. Extrapolating from the GAO Report's findings to these additional species presents a staggering picture of the many millions of acres of private land that have the potential to be designated critical habitat.

Congress has required the Secretary of Interior when designating critical habitat to consider *any and all relevant* impacts of specifying any particular area as critical habitat. 16 U.S.C. § 1533(6). NEPA has the institutional mechanics to generate information on all the relevant impacts of proposed critical habitat designations needed for the Secretary to make an informed decision. But the Secretary of Interior has refused to employ this tool. This question of NEPA application is truly an important issue of national significance affecting citizens of every state in this Nation.[2] It needs to be addressed now to establish national uniformity.

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[2] Every single state in the Nation contains listed species in addition to species considered candidates for listing. *Endangered Species Blueprint* at 21.

II
THE NINTH CIRCUIT'S RULING THAT ESA PROCEDURES IMPLICITLY DISPLACE NEPA PROCEDURES CONFLICTS WITH NUMEROUS OTHER CIRCUITS WHICH HAVE FOLLOWED SUPREME COURT PRECEDENT

The Court should grant certiorari because the Ninth Circuit's decision is in stark conflict with six other circuits[3] that have followed this Court's ruling in *Flint Ridge*, 426 U.S. at 787-88. In *Flint Ridge*, this Court addressed whether the Department of Housing and Urban Development had to file an environmental impact statement (EIS) before allowing a private developer's financial disclosure letter to become effective. In addressing this question, this Court recounted the purpose of NEPA. It stated:

> NEPA's instruction that all federal agencies comply with the impact statement requirement--and with all the other requirements of § 102--"to the fullest extent possible," 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees who wrote "fullest extent possible" language into NEPA.
>
> "The purpose of the new language is to make it clear that each agency of the Federal Government ***shall*** comply with the directives set out in [§ 102(2)] ***unless*** the existing law applicable to such agencies' operations expressly

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[3] *See* Petition for Writ of Certiorari (Petition) at 9-11.

> prohibits or makes full compliance with one of the directives impossible."

Flint Ridge, 426 U.S. at 788-89 (emphasis and brackets in original).

This Court continued to quote the conferees stating:

> the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. 115 Cong. Rec. 39703 (1969) (House Conferees).

Id. at 788.

This Court also concluded that, as serious as the mandate of NEPA was, it nevertheless was not intended to repeal by implication any other statute and, therefore, if requiring compliance with NEPA through the preparation of an environmental document would create a clear and unavoidable conflict with other statutory mandates, NEPA must give way. *Id.*

In this case, NEPA's environmental impact assessment requirement creates no clear and unavoidable conflict with the statutory requirements for designating critical habitat. In fact, the Ninth Circuit's decision does not even dispute that there is no "irreconcilable and fundamental conflict" with the Secretary's duties under ESA but rather found that the Circuit had never ruled that finding an irreconcilable conflict is the only way to avoid the requirements of NEPA. App. at 21a. Instead, the court ruled the language and legislative history of ESA implied that Congress intended NEPA not to apply when designating critical habitat. This creative position, however, is in direct conflict with this Court's ruling in *Flint Ridge* which specifically stated that the

question to be resolved in determining if NEPA applied was whether an ***irreconcilable and fundamental conflict*** existed. This basic standard of NEPA compliance, having been clearly articulated by this Court and followed by six other circuits, is now spurned by the Ninth Circuit Court of Appeals. This creates a major conflict that needs to be resolved by this Court.

III

THE NINTH CIRCUIT'S "DISPLACEMENT" DOCTRINE FOR EXEMPTING CRITICAL HABITAT DESIGNATION FROM NEPA COMPLIANCE IS IN CONFLICT WITH CONGRESSIONAL INTENT

Petitioner has pointed out with particular clarity that the Ninth Circuit's decision creating a new displacement exemption to NEPA is wrong. Petition at 13-19. First the Ninth Circuit relied on *Merrill v. Thomas*, 807 F.2d 776 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), to support its displacement theory, yet *Merrill* actually follows *Flint Ridge* in significant degree. *Flint Ridge* involved mandatory deadlines imposed by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq.* The Act requires private real estate developers involved in the interstate sales of unimproved land to file with the Department of Housing and Urban Development (HUD) disclosure statements containing information needed to protect prospective purchasers. The disclosure statement is automatically effective 30 days after filing at which time sales can then take place. This Court found that HUD could not prepare an EIS and still meet the requirement that disclosure statements go into effect within 30 days of filing. The deadlines under the Act were so short that NEPA's environmental assessment process with public comments and responses could not be complied with in time. Thus, an irreconcilable conflict existed negating the NEPA requirement.

In *Merrill*, Congress established pesticide registration procedures under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136, *et seq*. The FIFRA registration process called for expeditious action and Congress expected registration decisions within three months of receiving applications. *Merrill*, 807 F.2d at 778. The Ninth Circuit realized that, like the disclosure requirements in *Flint Ridge*, these pesticide registration deadlines also did not allow enough time for NEPA compliance. *Id.* at 777-81.

The Ninth Circuit also found an unmistakable congressional intent that NEPA and its time-consuming procedures ***did not*** apply because post-1972 FIFRA amendments altered registration requirements in order to greatly speed up a process that had been virtually ground to a halt by litigation. *Id.* at 780.

The Ninth Circuit found no comparable time conflicts in the instant case but instead shoehorned *Douglas County*'s facts into *Merrill's* congressional intent analysis. The 1978 ESA amendments expanded public notice and hearing requirements for critical habitat designations. The court found that these amendments indicated Congress' belief that not only the public participation requirements but all aspects of NEPA were therefore "superfluous" to the critical habitat designation process. App. at 17a. The court creatively ruled that ESA amendments designed to broaden the scope of considerations and flexibility in designating critical habitat were instead a narrow compromise that would be sabotaged by a requirement to comply with NEPA. App. at 18a. However, this finding makes no sense. NEPA can only serve to bolster flexibility in designating critical habitat as it would provide a much broader information base on which to make a decision and would provide enhanced public participation. *See, i.e., Trout Unlimited v. Martin*, 509 F.2d 1276, 1282 (9th Cir. 1974) (a principal purpose of NEPA is to inform Congress, the Executive, and the public about

environmental consequences of proposed actions). Moreover, ESA's legislative history, unlike FIFRA's, supports NEPA's applicability to critical habitat designation.

A. The 1978 Amendments to ESA Support NEPA's Applicability To Critical Habitat Designation

There is considerable legislative history that alone should have led the court to find that NEPA does indeed apply to critical habitat designation.

The 1973 Act "constructed a comprehensive means to balance economic growth and development with adequate conservation measures. ... Subsequent to its passage, the Act was amended in 1976, 1978 and 1979 to increase the flexibility in balancing species protection and conservation with development projects." H. Rep. No. 97-567 at 2809 (USCAN 1982). In 1978, Congress amended the ESA in a number of respects to restore balance to the statute. "Up until this time, the determination of critical habitat ha[d] been a purely biological question." H. Rep. No. 95-1625 at 9467 (USCAN 1978). The House Bill (H.R. 14104) changed that and directed the Secretary also to consider "economic and other relevant impacts" of the inclusion of specific areas as proposed critical habitat. H. Rep. No. 95-1625. The House Committee on Merchant Marines and Fisheries describes this expanded consideration requirement:

> With the addition of this new paragraph, the determination of critical habitat for invertebrates takes on significant added dimensions. *Economics and any other relevant impact* shall be considered by the Secretary in setting the limits of critical habitat per such a species. The Secretary is not required to give economics or any other "relevant impact" predominant consideration in his specification of critical habitat for invertebrates. Consideration and weight given to any particular

> impact is completely within the Secretary's discretion.
>
> ...
>
> The result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. The committee expects that in some situations the result in critical habitat will be different from that which would have been established using solely biological criteria. In some situations, no critical habitat would be specified.

Id. at 9467 (emphasis added).[4]

These "factors of recognized or potential importance to human activities" were to be added to the menu of considerations for designating critical habitat giving the Secretary greater decisionmaking "flexibility." The Secretary thus was provided the responsibility to obtain all necessary relevant information to reach a balanced decision and thereby exclude acreage where "the benefits of exclusion outweigh the benefits of specifying the area as part of the critical habitat." Pub. L. No. 95-632, 92 Stat. 3766.

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[4] While the House Bill proposed expanding critical habitat consideration for invertebrate animal species, Senate Bill 2899 was passed in lieu of the House Bill after amending the Senate Bill language to include much of the text of the House Bill. In conference, the expanded critical habitat considerations of H.R. 14104 were extended to all listed species.

All necessary relevant information can only be generated by a process like that specified by NEPA which does not focus only on biological impacts of designation. For example, an illustrative checklist of environmental impact assessment considerations under NEPA would require the following areas to be considered: (A) Land Transportation and Construction; (B) Land Use; (C) Water Resources; (D) Air Quality; (E) Service Systems; (F) Biological Conditions; (G) Transportation Systems; (H) Noise and Vibration; (I) Aesthetics; (J) Community Structure; (K) Other. Daniel R. Mandelker, *NEPA Law and Litigation* 10-8 (Clark Broadman Callaghan, NY 1995). This kind of broad-based inquiry, generated by the NEPA process, would provide the Secretary just what is needed to reach an informed, flexible decision: all relevant information. An inquiry considering only biological and economic concerns is truncated and biased in favor of a decision that considers a few, rather than all, relevant factors. Thus, the inference that Congress intended the Secretary to comply with applicable information generating statutes like NEPA which are ***not*** in irreconcilable conflict with ESA is overwhelming. *See Robertson v. Methow Valley Citizens Counsel*, 490 U.S. at 350.

B. The 1982 Amendments to ESA Provide Even Greater Basis for Applying NEPA to Critical Habitat Designation

Legislative activity in 1982 gives even more support to petitioner's argument that NEPA should apply to critical habitat designations. Following the 1978 amendments, Congress continued to refine and clarify ESA. Of particular relevance to NEPA's application to certain ESA activities was H.R. 6133 (Pub. L. No. 97-304) and its specification that the Secretary must "base his determinations regarding the listing or delisting of species 'solely' on the basis of the best scientific and commercial data available." H. Rep. No. 97-567 at 2820 (USCAN 1982). The committee explained why this clarification had occurred:

> The addition of the word "solely" is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species. The Committee strongly believes that economic considerations have no relevance to determinations regarding the status of species and intends that the economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act not apply. The Committee notes, and specifically rejects, the characterization of this language of the Department of the Interior as maintaining the status quo and continuing to allow the Secretary to apply Executive Order 12291 and other statutes in ***evaluating alternatives*** to listing.[5]

Id. (emphasis added).

The committee took an altogether different position regarding relevant considerations for the designation of critical habitat.

> The Committee notes, however, that the provisions of the Act relating to the designation of critical habitat remain unchanged by H.R. 6133 and the economic analysis provisions of Section 4(b)(4) and provisions of Executive Order 12291 and the aforementioned statutes relating to the analysis of regulations would continue to apply to the designation of critical habitat.

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[5] In 1981, the Sixth Circuit Court of Appeals decided *Pacific Legal Foundation v. Andrus*, 657 F.2d 829. The court found that ESA limited listing decisions to biological criteria and precluded consideration of any other factor, therefore, making an EIS unnecessary. It appears that in 1982 Congress decided to codify this decision.

Id. at 2820-21. The meaning could scarcely be clearer. While listing decisions are to be based only on biology, critical habitat decisions are to be based on much broader considerations. Specifically, the information gathering and analytical provisions of various other statutes are to be complied with in evaluating alternatives to a proposed critical habitat designation. Evaluation of alternatives is, of course, at the heart of NEPA and the EA/EIS process. *See* 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.4, 1502.14.

The court, in *PLF v. Andrus*, emphasized that the primary purpose of NEPA is to ensure an informed decision by the agency contemplating federal action. 657 F.2d at 838. But, "if the agency cannot consider the environmental impact [of an agency action], an impact statement is useless to the agency in evaluating its action. ... [It] is not necessary to evaluate the priority the Secretary is to give to listing species as Congress has already done it." *Id.* at 838. But, that is not the case here. The agency can and must consider the total environmental impact of its designation decision. Without NEPA compliance, environmental impacts beyond those related to the listed species will be unknown. As stated by the District Court, "[e]ven if the purpose of the agency or the agency action (designating critical habitat in this case) is to enhance the environment or maintain the status quo, the environmental consequences of a particular agency action cannot be determined absent an environmental assessment." App at 50a-51a.

The petitioner in this action has asked for nothing more than the assurance that, when designating critical habitat, the FWS will make an informed decision. Unlike with the listing of a species, FWS can consider all environmental impacts and any other relevant considerations including economic impact. As the House Report of 1978 amendments indicated, "factors of recognized or potential importance to human activities in an area will be considered by the

Secretary in deciding whether or not all or part of that area should be included in the critical habitat." An EIS is critical to the consideration.

In response to this argument, the Ninth Circuit took the curious position that the ESA process for designating critical habitat furthers the goals of NEPA without requiring an EIS. App. at 25a. Such a finding establishes a dangerous precedent, however, as it acts to exalt biological concerns over all other factors, including environmental concerns, when designating critical habitat. But, what are the cumulative environmental effects of designation? What alternative designations are available that would still protect habitat but have less negative impacts on the human condition? Without NEPA compliance, this type of information will never be known.

Congress established NEPA to ensure that federal agencies make environmentally informed decisions. 42 U.S.C. § 4332(2)(A). In its ESA amendments of 1978 and 1982, Congress underscored that, when designating critical habitat, the Secretary of Interior was to make informed decisions by evaluating not just biological data but all other relevant data. 16 U.S.C. § 1533(b)(3).

However, by negating the application of NEPA herein, the Ninth Circuit assured that the Secretary will never have all of the necessary data. Despite the fact that the District Court found in its decision that the "defendant's designation of critical habitat will profoundly affect the quality of life in Douglas County," App. at 39a, and that the county's own lands adjacent to the proposed critical habitat could be significantly affected by the government "failing to properly manage for insect and disease control, and fire," the Ninth Circuit nevertheless found that Congress did not give "the Secretary the discretion to consider environmental factors, other than those related directly to the preservation of the

species" when designating critical habitat.[6] App. at 26a. The court found that the Secretary "cannot engage in the very broad analysis NEPA requires when designating a critical habitat under the ESA." *Id.* This conclusion simply cannot be found in the express language of ESA, in the legislative history of ESA, in the purposes of NEPA, or in the case law history of this Court.

CONCLUSION

This case is extremely important. The lower court's ruling establishes radical new precedent allowing the federal government to ignore the requirements of NEPA in situations where that law would provide the regulators with crucial information--information that Congress intended to be taken into account before reaching a decision. This case needs to be addressed so this Court can reestablish Congress'

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[6] One commentator criticized the federal government's failure to adhere to NEPA stating:

> The FWS needs to promulgate rules on ... critical habitat designation procedures so that methods for incorporating economic and social information and balancing mechanisms can be clearly set out. One way to accomplish this is to follow the procedures specified in the National Environmental Policy Act. The Service has been very disingenuous in stating that listing, designation of critical habitat, and the preparation of recovery plans in the endangered species program do not have major effects on the natural and human environment. While they may not in every--or even most--cases, the mechanisms under the NEPA process are set up to deal with this issue.

Souder at 1138.

constitutional authority to determine when a statute's provisions apply and when they do not.

The petition for certiorari should be granted.

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Respectfully submitted,

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